89-1981

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOWARD E. WILLIAMS

PETITIONER/APPELLANT

V.

CITY OF NORTHPORT,

RESPONDANTS/DEFENDANTS

PETITION FOR WRIT FOR CERTIORARI FROM SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

WILLIAM M. DAWSON

ATTORNEY AT LAW

933 FRANK NELSON BUILDING

BIRMINGHAM, ALABAMA 35203

(205) 323-6170

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A FINAL JUDGMENT of the Supreme Court of Alabama denying Writ of Certiorari to Alabama Court of Civil Appeals is in violation of prior decision of the Supreme Court of Alabama concerning mental competency being determined by jury and and said final judgment deprives the Petitioner of his property and liberty rights without Due Process of law guaranteed to him by Fifth and Fourteenth Amendments to the United States Constitution?

II. WHETHER A FINAL JUDGMENT of the Supreme Court of Alabama violates the Contract Clause of the United States Constitution when workmen's compensation statutory law requires a judge instead of jury to decide mental competency when an expert witness, a psychiatrist testifies and is uncontroverted?

III. WHETHER A FINAL JUDGMENT of the Supreme Court of Alabama rendered in violation of prior decisions of said Court, deprives Petitioner of the equal protection of the law guaranteed him by the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Howard E. Williams, Petitioner,
(Appellant and Plaintiff below),
City of Northport, a municipal corporation,
Respondent, (Appellee and Defendant below).

TABLE OF APPENDIX Page

Exhibit A Order Denying "Motion for Reconsideration of Ruling and, in the Alternative, Motion for Relief from Judgment Pursuant to ARCP Rule 60 (b), dated March 2, 1989 by Circuit Judge of Circuit Court of Tuscaloosa County, Alabama..... a-1

Exhibit B Opinion of the Alabama Court of Civil Appeals, dated November 1, 1989, that affirmed the lower court..... a-12

Exhibit C Application for rehearing overruled, dated November 29, 1989.....a-16

Exhibit D Order denying writ for Certiorari dated February 23, 1990, from the Supreme Court of Alabama..... a-17

TABLE OF CONTENTS

	Page
Questions Presented for Review ...	i
Table of the Appendix	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statement of the Case	4
Reasons for Granting the Writ	8
Conclusion	18
Certificate of Service	19

TABLE OF AUTHORITIES

Page

Brown v. Murray Security Guard Company, 404 So. 2d 79 (Ala Civ App 1981) ... 16

Columbia Railway Gas & Electric Co. v. South Carolina, 261 U.S. 236, 43 S. Ct. 306 (1923) 12

Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632, 32 S. Ct. 577, 56 L. Ed. 924 (1912) 12

Edwards v. Habib, 397 F. 2d 687 (D.C. Cir. 1968) 14

Hann v. City of Clinton Oklahoma, 131 F. 2d 978 (10th Cir. 1942) .. 13

Hosey v. Club van Carlandt, 299 F. Supp. 501 (S.D.N.Y. 1969) 14

Kroger Co. v. Millsap, 280 Al 531, 196 So. 2d 380 (1967) 8,10,15,16

Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed 1434 (1934).. 11

TABLE OF AUTHORITIES

(CONTINUED)

Marinella v. Shell Oil Company, 411 F. 2d 853 (3rd Cir. 1975) 13

Ex parte Neal, 551 So. 2d 933, (Ala. 1989) 10

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). 14

Northern Cheyenne Tribe v. Northern Cheyenne, 505 F. 2d 268 (9th Cir. 1974) 9

North Texas Producers Association v. Young, 308 F. 2d 235 (5th Cir) cert denied, 83 S. Ct. 874, 372 U.S. 929, 9 L. Ed. 2d 733 (1968).. 11

Seibold v. Daniels, 337 F. Supp. 210, (U.S. Dist. Court,M.D. Ala. 1972) ..15

TABLE OF AUTHORITIES

(CONTINUED)

Shelley v. Kraemer, 334 U.S. 1, 68 68 S. Ct. 836, 92 L. Ed. 1161 (1948)..... 14

Sierra Club v. Morton, 405 U.S. 727, (1922) 15

Southwestern Petroleum Corp. v. Udall, 361 F. 2d 650 (10th Cir. 1966) .. 9

TerreHante & Indanapolis Railroad v. Indiana, 194 U.S. 579, 24 S. Ct. 767, 48 L. Ed. 1124 (1904)..... 12

U.S. Constitution

Amendment Five 4

Amendment Fourteen 3

Article 1, sec. 10 3

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PETITION FOR WRIT FOR CERTIORARI FROM

SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner suffered a judgment in the Circuit Court of Tuscaloosa, County, Alabama, on March 2, 1989. The Circuit Judge denied the "Motion for Reconsideration of Ruling, and in the Alternative, Motion for Relief from Judgment Pursuant to ARCP Rule 60(b)." which appears as Exhibit A, a-1.

The opinion affirming the lower court from the Alabama Court of Civil Appeals, dated November 1, 1989, appears as Exhibit B, a-12.

The Notice of the denial of rehearing from the Alabama Court of Civil Appeals, dated November 29, 1989, appears as Exhibit C, a-16.

Your Petitioner's petition for Writ of Certiorari to the Alabama Court of Civil Appeals, dated February 23, 1990, was denied by the Supreme Court of Alabama, and appears as the Exhibit D, a-17.

JURISDICTION

The Judgment of the Supreme Court of Alabama, of which review and reversal are sought, is the Judgment of the highest court of the state of Alabama and a final Judgment within the meaning of the Jurisdictional statute. Jurisdiction is therefore, invoked under Title 28, United States Code, Section 1257 (3).

Constitutional and Statutory

Provisions Involved

(1) Article I, section 10 of the Constitution of the United States, provides, in part, as follows:

"no state shall ... pass any ... law impairing the obligation of contract

(2) Amendment XIV of the Constitution of the United States provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law..."

(3) Amendment XIV of the Constitution of the United States further provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(4) Also, jurisdiction of this Court is invoked under U.S. Constitution, Amendment V, "no person shall ... be deprived of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

Petitioner/Plaintiff/Appellant, Howard Williams, had a Workmen's Compensation claim against the Appellee, City of Northport. A settlement was filed on April 26, 1988, in the Circuit Court of Tuscaloosa County at which time a final judgment was entered. On May 25, 1988, Petitioner/Appellant through his attorney filed a motion to set aside the judgment alleging newly discovered evidence as a basis for the motion. Mr. Williams asserted disability because of emotional and psychological dysfunction. The motion was supported by the affidavit of Bernard Bryant, M.D., who stated that the Plaintiff suffered from a dysthymic depression.

On June 24, 1988, the Circuit Court of Tuscaloosa County denied Appellant's motion to set

aside the judgment. On July 22, 1988, Petitioner/Appellant filed a motion under ARCP 60(B) asserting that he was incompetent to enter into a settlement of the case.

On November 21, 1988, the Circuit Court heard evidence ore tenus on the motion. This appeal to the Alabama Court of Civil Appeals followed. Petitioner/Appellant also filed a motion to modify or correct the record under ARAP 10(f) with the trial court.

Petitioner/Appellant Williams was a police officer with the City of Northport. On October 30, 1987, the parties to the Workmen's Compensation claim had a meeting but failed to enter into a settlement. Appellees have submitted an affidavit of G. Steven Henry who stated that Appellant Williams was accompanied by an attorney who was present to "advise him" on October 30, 1987. G. Steven Henry was the attorney representing the City of Northport. The order issued by the Circuit Court of Tuscaloosa County denying Appellant's Motion for relief from judgment cited this affidavit of the City Attorney as

evidence that Plaintiff was "represented by an attorney" on October 30, 1987. No settlement was entered into on that date. The settlement agreement appealed from was entered into on April 26, 1988, at which time Plaintiff was not represented by attorney.

The first motion to set aside the judgment filed May 25, 1988, was denied on June 24, 1988. On July 22, 1988, Appellant filed the motion whose denial was appealed to the Alabama Court of Civil Appeals, asserting that Mr. Williams was not competent to enter into a settlement of this case and supporting his motion with the affidavit of Bernard Bryant, M.D., who stated that Appellant was only superficially aware of the court proceedings and was incompetent to make rational decisions due to impaired judgment.

At the ore tenus hearing on November 21, 1988, Dr. Bryant testified that Appellant suffers from dysthymic disorder which he described as a depression that has been going on for two

years or more and which includes symptoms of insomnia, restlessness, feelings of hopelessness, helplessness, remorse, guilt, tension, and anxiety. The doctor concluded that Appellant was incompetent on April 26, 1988. He had seen the Plaintiff in March and May of 1988. (T6,7). The evidence presented by Dr. Bernard Bryant was uncontroverted. The Appellees presented no evidence at the hearing on the motion.

Trial Court denied the motion on March 2, 1989, concluding that Plaintiff had been competent to settle his case on April 26, 1988.

The Alabama Court of Civil Appeals affirmed, and denied the rehearing. The Alabama Supreme Court of Alabama denied the Writ of Certiorari to the Alabama Court of Civil Appeals.

REASONS FOR GRANTING THE WRIT

I. The bottom line is whether there is a double standard for determining whether a person is mentally competent in the State of Alabama since in a criminal case a jury may determine whether a person is mentally competent but not in Workmen's Compensation cases. See Kroger Co. v. Millsap, 280 Al 531, 196 So. 2d 380 (1967) which held that an expert's opinion is not conclusive in the trial court. A judge can make a decision on mental competency in a Workmen's Compensation case even though a pyschiatrist testified and his testimony [Dr. Bernard Bryant in instant case] was uncontroverted. See Appendix a-6 which states,"(In workmen's compensation cases, experts' opinion are not conclusive on the trial court even though those opinions are uncontroverted)"... The point is by the Supreme Court of Alabama denying the Writ of Certiorari to the Alabama Court of Appeals which also affirmed the lower court [see Appendix

a-12], the Supreme Court of Alabama is violating prior decision of the Supreme Court of Alabam concerning mental competency being determined by jury in criminal cases unless double standard for Workmen's compensation cases, and said final judgment deprives the Petitioner of his property and liberty rights without Due Process of law guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution. The instant case should be remanded so that a jury can determine competency in a Workmen's Compensation case, when a police officer can be shot in the line of duty and there is no Workmen's Compensation to pay for the medical expenses which are permanent and ongoing expenses.

The Federal courts have said that under the Fifth Amendment to the United States Constitution rights incident to ownership cannot be divested by actions of the United States without due process of law. Northern Cheyenne Tribe v. Northern Cheyenne, etc. 505 F. 2d 268, (9th Cir. 1974), Southwestern Petroleum Corp. v. Udall, 361

F. 2d 650 (10th Cir. 1966). It is equally important that deprivation by Judicial decision rather than by legislation, be required to comply with due process.

See Exparte Neal, 551 So. 2d 933 (Ala. 1989), which held jury determines mental competency.

II. The second reason the instant case should be remanded because the Supreme Court of Alabama by denying the Writ of Certiorari has violated the Contract Clause of the United States Constitution when Workmen's compensation statutory law requires a judge instead of jury to determine mental competency when an expert witness, a psychiatrist treating the Petitioner, testified as to mental competency and his testimony was uncontrovered. However, because of the Kroger case [Kroger Co. v. Millsap, 280 Al 531, 196 So. 2d 380 (1967), which should be overruled as law because a person in a civil case should have the same right as in a criminal case that a jury may determine mental competency.

Petitioner contends that he has a sufficient controversy in order to obtain Judicial resolution of the controversy. Sierra Club v. Morton, 405 U.S. 727 (1972). He contends that a controversy exist under Article I, Section 10 of the United States Constitution which provides that

"no state shall ... pass any ... law impairing the obligation of contracts....."

A Court decision which operates in the same manner as legislation to destroy valuable property rights gained under a contract is a violation of this provision of the Constitution. It has been held that a valid contract is property. Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934); North Texas Producers Association v. Young, 308 F. 2d 235 (5th Cir.) cert. denied, 83 S. Ct. 874, 372 U.S. 929, 9 L. Ed. 2d 733 (1962).

Admittedly, the general rule is that the contract clause is violated only by

a legislative enactment subsequent to the creation of a contractual obligation. The Prohibition ordinarily does not reach Judgments by a state court interpreting laws in existence when a contract was made. As a results, errors in the decision of state courts, even though they impair obligation of contracts usually do not give rise to a federal question. Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632, 32 S. Ct. 577, 56 L. Ed 924 (1912). However, some exceptions to the rule have developed. For Example, Columbia Railway Gas & Electric Co. v. South Carolina, 261 U.S. 236, 43 S. Ct. 306, (1923) and Terre Hante & Indianapolis Railroad v. Indiana, 194 U.S. 579, 24 S. Ct. 767, 48 L. Ed. 1124 (1904) stand for the proposition that a state decision may, without specific reliance on a statute, by express implication give effect to a subsequent enacted

statute and, thus, violate the Constitution. Marinella v. Shell Oil Company, 411 F. 2d 853 (3rd Cir. 1975). Another exception has been recognized in cases in which a changed interpretation of a law, which was in effect at the time the contract was made, thus alters the rights of parties to the contract. In Hann v. City of Clinton Oklahoma, 131 F 2d 978 (10th Cir. 1942). An Oklahoma law existing at the time of the contract was found to be an essential part of the contract. Accordingly, the court found that a change of interpretation after rights are acquired is the same in its effect as an amendment of the law by means of a legislative enactment.

III. The Judgment of the Supreme Court of Alabama is state action and deprives the Petitioner of the equal protection of the law.

The Equal Protection of the law, guaranteed in the Fourteenth Amendment, also has been denied to petitioner by the decision of the Alabama Supreme Court. The application of state law by the Judiciary, even in a lawsuit between private parties, may constitute state action which must conform to the requirements of the Constitution. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); Edwards v. Habib 397 F. 2d 687 (D.C. Cir. 1968). This may be so even though the state is enforcing a Private Negotiated Contract. Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948); Hosey v. Club van Cartlandt, 299 F. Supp. 501, (S.D.N.Y. 1969).

In this instant case, the Alabama Supreme Court deprived Petitioner of his constitutional right to equal protection of the law in refusing to construe Workmen's Compensation mental competency in the same way as in a criminal case i.e. jury can determine mental competency in criminal case but in civil case of Workmen's Compensation judge determines whether mental competency even after an expert psychiatrist testified at the trial court and was uncontroverted. The Kroger Co. v. Millsap, 196 So. 2d 380 in Alabama should be overruled to prevent violation of the Petitioners due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution as well as violation of his contract rights and equal protection under the law.

See Seibold v. Daniels, 337 F. Supp. 210, (U.S. Dist. Court, M.D. Ala., 1972), which held,

"A state statute cannot be construed to obviate a constitutional requirement."

Therefore, the Kroger case, Kroger Co. v. Millsap, 280 Al 531, 196 So. 2d 380 (1967), should be overruled and a jury allowed to determined mental competency or at least when expert psychiatrist states litigant is mentally incompetent to represent himself the Honorable court should consider the expert testimony.

In Brown v. Murray Security Guard Company, 404 So. 2d 79 (Ala Civ App 1981) in which an employee appealed from denial of his motion for relief from a settlement entered into in a Workmen's Compensation case this court held that the trial court had abused its discretion in denying the motion in light of the evidence of the employee's incompetence at the time he entered into the settlement, his lack of counsel at that

time and the consideration of the original purpose of the Workmen's Compensation laws to insure quick and efficient compensation for work related injuries. Brown controls the fact situation in the present case.

If a state statute cannot be construed to obviate a constitutional requirement to show due process in the Court, then case law, [the Kroger case] should be overruled when the litigant's due process under the 5th and 14th Amendments to the U.S. Constitution are violated when the Kroger case is followed at the expense of the litigant never having his medical expenses paid which are a direct result of the Petitioner/Plaintiff/Appellant being shot in the line of duty as a police officer in the City of Northport.

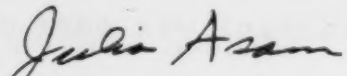
CONCLUSION

The Denial of the Writ of Certiorari by the Supreme Court of Alabama, in the instant case the Petitioner's due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution as well as his equal protection rights under the law and contract rights as stated were violated.

The instant case should be reversed and remanded with instructions to have the state court to comply with the U.S. Constitutional law to prevent loss of property rights in Workmen's compensation to pay for medical expenses when a police officer was shot in the line of duty and the City of Northport has not properly compensated the police officer, the petitioner, who worked for about ten (10) years with the City of Northport Police Department.

It is respectfully requested that the case be reviewed by this Court and reversed.

Respectively submitted,



Julia Asam

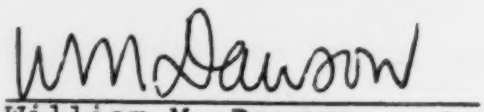
Attorney At Law

Suite 10, North View Plaza

3120 McFarland Blvd.

Northport, Alabama 35476

(205) 333-1999



William H. Dawson
Attorney at Law
933 Frank Nelson Building
Birmingham, AL 35203
(205) 323-6170

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Writ for Certiorari was sent to Ms. Patricia K. Rea, Attorney At Law, Clark & Scott, P.C. 3500 Blue Lake Drive, Suite 350, Birmingham, Alabama 35243-1907 this 19 day of May, 1990.

Julia Asam

Julia Asam

Exhibit A

"IN THE CIRCUIT COURT OF TUSCALOOSA COUNTY, ALABAMA

HOWARD WILLIAMS Civil Action No.

Plaintiff, CV-88-322

vs.

CITY OF NORTHPORT,

Defendant.

ORDER

This case was heard on plaintiff's "Motion for Reconsideration of Ruling and, in the Alternative, Motion for Relief From Judgment Pursuant to ARCP Rule 60(b)." After due hearing and full consideration of the evidence, case history, arguments of counsel, and the law, the Court is of the opinion that the motion is due to be denied.

This case was a workmen's compensation claim which was settled by the parties. The case records and evidence before the Court prove the following facts, which the Court specifically finds to be the facts.

As Early as October 30, 1987, the plaintiff actively was attempting to settle his claims against the City of Northport. The unrefuted evidence proves, and this Court finds, that the plaintiff at that time was represented by an attorney. Further, he conducted a lengthy review of the documents, debated factual details and settlement terms with the city's attorney, and discussed the possible inclusion of damages for psychological injuries. The city's attorney concluded that the plaintiff was fully aware of the details, was capable of negotiating, and fully understood the discussions. On that date the plaintiff rejected the then-proposed settlement and the scheduled settlement conference with the Court was cancelled.

Plaintiff and defendant subsequently settled the Plaintiff's workmen's compensation claims against the defendant on April 26, 1988. On that date the parties filed a settlement agreement in this Court. After reviewing the agreement

and questioning the parties, this Court approved the settlement and entered a final judgment.

On May 25, 1988, the plaintiff through his attorney filed a motion to set aside the judgment. He alleged newly-discovered evidence as the basis for the motion. The plaintiff asserted a 100% disability because of emotional and psychological dysfunction. The motion was supported by an affidavit of Bernard Bryant, M.D., stating that the plaintiff suffered from a dysthymic depression.

On June 24, 1988, this Court denied the plaintiff's motion to set aside the judgment. The Court specifically noted that the averments neither supported the claim of newly-discovered evidence, nor claimed that the plaintiff was incompetent to settle his case.

On July 22, 1988, the Plaintiff filed the motion new being addressed. He now asserts that he was incompetent to enter into a settlement of this case. Again, he supports his motion with an affidavit of Bernard Bryant, M.D., who states that

the plaintiff only superficially was aware of the court proceedings and was incompetent to make rational decisions due to impaired judgment. The plaintiff neither has averred nor has shown any reason for his failure to raise incompetency as a ground in his motion to set aside the judgment.

On November 21, 1988, this Court heard evidence ore tenus on the motion. Additionally, the Court has before it the pleadings, the affidavit of Hon. G. Steven Henry, and the Court's own observations and knowledge of the events.

Plaintiff's motion rests on Ala.R.Civ.P. 60(b)(6); "[T]he court may relieve a party ... from a final judgment, order, or proceeding for the following reasons:...(6) any other reason justifying relief from the operation of the judgment." This Court has wide, but not unlimited, discretion in its determination of whether to grant relief pursuant to Rule 60(b). See, e.g., Howell v. D.H. Holman Ltd., 420 So. 2d 26 (Ala. 1982); Fabarc Steel Supply, Inc. v. Davis, 422 So. 2d

797 (Ala. Civ. App.), cert. denied, No. 82-66 (Ala. 1982). In considering Rule 60(b) motions, the Court must balance the need to remedy injustice against the need for finality of judgments. Id. Recognizing the responsibility placed on this Court, the Court carefully has considered and assessed the evidence and has conducted an extensive review of the law. As previously stated, the Court concludes that the motion is due to be denied.

Dr. Bryant testified that the plaintiff suffers from dysthymic disorcer, which he described as "basically a depression that has been going on for a duration of two years or more." He described the symptoms as "[i]insomina; hypersomnia, which is restlessness; early morning awakening; poor appetite; feelings of hopelessness; helplessness; remorse; guitl; tension; anxiety; and oftentimes tearfulness." The doctor concluded that the plaintiff was incompetent on April 26, 1988. Dr. Bryant did not see the plaintiff on April 26, 1988. He saw the plaintiff in March and on May

26, 1988.

An expert's opinion is not conclusive on the trial court. See Kroger Co. v. Millsap, 280 Ala. 531, 196 So. 2d 380 (1967) (In workmen's compensation cases, experts' opinions are not conclusive on the trial court even though those opinions are uncontroverted); accord, Carroll Costr. Co. v. Hutcheson, 347 So. 2d 527 (Ala. Civ. App. 1977); Unexcelled Mfg. Corp. v. Ragland; 52 Ala. App. 57, 289 So. 2d 626 (Ala. Civ. App. 1974); Stewart v. Busby, 51 Ala. App. 242, 284 So. 2d 269 (Ala. Civ. App. 1973). A trial court must look to the entire evidence and to its own observations in deciding factual issues. See e.g. Blue Bell, Inc. v. Nichols, 479 So. 2d 1264 (Ala. Civ. App.) (trial court must look to entire evidence and its own observations in determining the extent of disability), cert.denied, No. 85-96 (Ala. 1985). Even lay testimony on the issue of a claimant's mental health may be considered. See, e.g., Federal Mogul Corp. v. Campbell, 494 So. 2d 443 (Ala. Civ. App. 1986). Although Dr.

Bryant's opinion is not binding on this Court, the Court has carefully has weighed the evidence in its consideration of all of the evidence. The Court has reached an opinion that Dr. Bryant's conclusion that the plaintiff was incompetent on April 26, 1988 is outweighed by the other evidence before the Court.

This Court observed the plaintiff during the settlement conference. because at that time the plaintiff was not represented by counsel, this Court carefully observed the plaintiff. The Court advised him of the nature of and finality of the proceedings, and the details of the settlement. This court treats a workmen's compensation settlement in which a claimant is unrepresented by counsel much as it would a plea of guilty in a criminal case. The Court conducts a thorough colloquy and permits the claimant to ask questions and make statements. On the occasion in issue this Court has a specific recollection of the events because the Court knew both the plaintiff and the city's

attorney. This Court is convinced that the plaintiff was competent to, and did, understand the proceedings and the details of the settlement. On the ocassion in issue, the plaintiff was lucid. He did not exhibit any restlessness or inappropriate behavior. He was appropriately responsive to the Court's inquiries. He readily discussed the case and his situation with the Court. He did not exhibit any difficulty in concentrating, thinking, remembering, or making decisions, as might be expected during a depressive episode. He did not appear anxious, irritable, fearful, sad, blue, or moody. He was not withdrawn or irresponsive. To the contrary, his actions, speech, and responses were totally appropriate.

There eventually must be an end to litigation. Pace v. Jordon, 348 So. 2d 1061 (Ala. Civ. App.), cert. denied, 348 So. 2d 1065 (Ala. 1977). Rule 60 (b) relief normally is available only under the most extraordinary and compelling circumstances. Smith v. Clark, 468 So. 2d 138 (Ala. 1985); City of Daphne v. Caffey, 410 So. 2d 8

(Ala. 1981); Howell, supra (only in cases of extreme hardship or injustice); Pace, supra. The relief provided by the rule is not available to relieve a litigant from a free, calculated, and deliberate choice made by the litigant. See Porter v. Mobile Pulley & Mach. Works, 507 So. 2d 529 (Ala. Civ. App. 1987).

The plaintiff primarily relies on the case of Brown v. Murray Security Grand Co., 404 So. 2d 79 (Ala. Civ. App. 1981) (judgment due to be set aside where evidence overwhelmingly proves Brown case clearly is distinguishable from the instant case.

First, in Brown the litigant had an intelligence quotient of 62 (midly mentally retarded). This Court has no evidence to indicate that the plaintiff is mentally retarded. In fact, the Court's observation of and experiences with the plaintiff lead this Court to conclude that the plaintiff is quite intelligent.

Second, in Brown the overwhelming weight of the evidence convincing proved that the litigant in

that case was incompetent at the time of the settlement. This Court has concluded, based on all of the evidence before it, that the plaintiff was not incompetent at the time of the settlement.

Third, the trial judge in Brown observed.

"This is one of the most pathetic situations it has been [my] misfortune to have to preside over. The Court at this time finds that the Plaintiff is permanently and totally disabled as a result of the accident and injury complained of, and should have received compensation for permanent and total disability."

404 So. 2d at 81. This court is not at all satisfied that this case presents either a pathetic situation or an uncompensated permanent injury.

This Court thoroughly understands the purpose of the workmen's compensation laws. At every hearing of a workmen's compensation settlement, including the one in issue, this Court keeps sight of that purpose. The Court carefully reviews the case and the settlement provisions with the litigants. The Court also conducts a thorough and

searching colloquy with the parties. In cases in which a litigant is unrepresented by counsel, the Court especially is careful to satisfy itself that the provisions of the settlement are knowingly and willingly agreed to by the unrepresented litigant. Based upon all of the evidence before this Court, the Court concludes that the plaintiff was competent to settle his case on April 26, 1988.

The Court denies the motion. Any attendant costs are taxed to the plaintiff.

This the 2d day of March, 1989.

/s/ Joseph A. Colquitt

Joseph A. Colquitt

Circuit Judge

Exhibit B

STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1989-90

Civ. 6990

Howard E. Williams

v.

City of Northport

Appeal from Tuscaloosa Circuit Court

RUSSELL, Judge

This is an appeal from the trial court's denial of the employee's motion for relief from judgment pursuant to Rule 60(b)(6), Alabama Rules of Civil Procedure.

The employer and employee entered into a settlement agreement of a workmen's compensation claim, which was filed and approved by the trial court on April 26, 1988. The employee filed a motion to set aside the settlement pursuant to Rule 59, A.R. Civ. P., alleging the discovery of new evidence. Such motion was denied. Subsequently, the employee filed a motion for reconsideration of ruling and, in the alternative, a motion for re-

lief from judgment as provided for in Rule 60(b)(6), A.R. Civ. P., alleging that he was incompetent to enter into a settlement of his claims. An ore tenus hearing on the motion was held before the trial judge. The motion was denied on March 2, 1989.

The employee appeals. we affirm.

A review of a trial court's denial of a 60(b)(6) motion is limited to whether the trial court absued its discretion. Smith v. Clark, 468 So. 2d 138 (Ala. 1985). This court is further limited to a review of the grounds for which the Rule 60 (b) relief is sought and the matters presented in support thereof. Turner v. Turner, 462 So. 2d 734 (Ala. Civ. App. 1984). Also, as noted by the court in Reese v. Robinson, 523 So. 2d 398, 399 (Ala. 1988), "[a] strong presumption of correctness, however, attaches to the trial court's ruling on a Rule 60(b) motion."

We find that the trial court's denial of this motion did not amount to an abuse of discretion. The employee argues that, because expert testimony

regarding the employee's alleged incompetence was uncontroverted, the trial court's denial of his motion constituted an abused of discretion. An expert's opinion, however, is not conclusive on the trial court, even though uncontroverted. See Kroger Co. v. Millsap, 280 Ala. 531, 196 So. 2d 380 (1967). Rather, a trial court must look to the entire evidence and its own observations in deciding factual issues. See, e.g., Blue Bell, Inc. v. Nichols, 479 So. 2d 1264 (Ala. Civ. App. 1985).

In its order denying the motion, the trial court clearly found that the expert testimony concluding that the employee was incompetent at the time of settlement was outweighed by other evidence, in cluding the court's own observation of the employee during the course of settlement. Furthermore, the court took the additional caution of advising the employee, who was not represented by counsel, of the nature and finality of the settlement proceedings. Consequently, we find no error.

Additionally, the employee appeals from the de-

nial of his motion to correct or modify the record pursuant to Rule 10(f), Alabama Rules of Appellate Procedure. The employee asserts that certain documents were "erroneously and accidentally" omitted from the record. We disagree. Rule 10(f) governs omissions of material that were actually a part of the record below. In its denial of the motion, the trial court clearly established that the documents that the employee sought to have included had never been before the trial court as part of the record. Thus, they could not properly be added to the record on appeal. The supreme court has held that "[it]t is not proper to use a hearing for correction of the transcript for the introduction or receipt of evidence which could or should have been introduced on the trial." Sylvest v. Stowers, 276 Ala. 695, 701, 166 So. 2d 423, 429 (1964). Consequently, we find no error with respect to this issue.

The appellant's request for attorney fees on appeal is denied.

This case is due to be affirmed.

AFFIRMED.

Ingram, P.J., and Robertson, J., concur.

1st Nov. 1989

/s/ John H. Wilkerson, Jr.

Clerk Court of Civil Appeals of Alabama

EXHIBIT C

OFFICE OF

CLERK OF THE COURT OF CIVIL APPEALS

STATE OF ALABAMA

MONTGOMERY

Circuit Court No. CV 88-322

RE: CIV. 6990

November 29, 1989

Howard E. Williams, Appellant

vs.

City of Northport, Appellee

Application for rehearing overruled. No opinion written on rehearing.

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

Mailing Address:

2600 East South Boulevard, Room 250

Montgomery, Alabama 36116

EXHIBIT D

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

February 23, 1990

89-428

Ex parte Howard E. Williams

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Re: Howard E. Williams v. city of Northport)

(CIV 6990 (tuscaloosa CV-88-322))

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

ADAMS, J. - Hornsby, CJ., Maddox, Almon and Steagall, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23 day of Feb. 1990.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama